SUPREME COURT, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 961

MAX WRIGHT, *Petitioner,*

v.

MASONITE CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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The petitioner and the plaintiff in this civil suit action respectfully pray that a Writ of Certiorari be issued to review the Judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on October 19, 1966.

Opinions Below

The opinion of the District Court for the Middle District of North Carolina is reported at 237 F. Supp. 129 (1965). The opinion of the Court of Appeals for the Fourth Circuit is reported at — F. 2d ——.

Jurisdiction

The Judgment of the Court of Appeals for the Fourth Circuit was made and entered on October 19, 1966 (R 38), and copy thereof is appended to this Petition in the Tran-

script of Record at pp. 23-36. The jurisdiction of this Court is invoked under 28 U.S.C. 2101 (c).

Questions Presented

The petitioner owned a small grocery store in Thomasville, North Carolina. The respondent constructed and operated a plant adjacent to petitioner's grocery store. Poisonous and noxious fumes from the respondent's plant entered petitioner's grocery store and substantially destroyed the business and livelihood of the petitioner.

The evidence substantiated that respondent expelled the fumes into the atmosphere because they were noxious and intolerable in respondent's own plant and were therefore exhausted by powerful fans, thereafter entering petitioner's grocery store and destroying his business. However, the District Court, while finding that petitioner was damaged substantially, held that the law of the state did not permit recovery because petitioner had failed to show that respondent knew the fumes were causing damage to petitioner, although respondent knew that the fumes were being deposited in the air around petitioner's store.

The Court of Appeals affirmed the District Court, with Judge Bryan dissenting. In substance, the majority of the Court held that the law of North Carolina required an "intentional" invasion of the petitioner's property in order to recover. In his dissent, Judge Bryan held that the issue was not whether the injury was intentional but whether the causative acts were intentional. In this connection, the District Court stated in its Findings of Fact as follows:

> "The defendant knew for a number of years that it was discharging the fumes from its finishing plant, including fumes from the synthetic materials used in its spray booth containing urea-formaldehyde, into the atmosphere." See Appendix, Page I (15).

The sole question presented is:

1. Whether the decision of the majority of the Court of Appeals for the Fourth Circuit is in conflict with the Law of North Carolina in holding that in order to constitute actionable nuisance the wrongdoer must intend the specific invasion of another's property, or whether it is sufficient under the Law of North Carolina if he intended to do the acts which were necessarily calculated to cause the invasion.

Statutes, Federal Rules and Regulations Involved

There are no statutes, rules, or regulations directly pertinent to this Petition.

Statement

For seventeen years, petitioner operated a small grocery store in a residential area in the small town of Thomasville, North Carolina. Masonite Corporation constructed a plant next door to petitioner's grocery store and shortly after the plant began operating, the facts occurred out of which this action arose.

Masonite Corporation used various chemicals in its plant, including chemicals which had by-products of formaldehyde and ammonia. In December, 1962, Masonite Corporation installed an elaborate exhaust system in its plant which blasted 40,000 cubic feet of air per minute out of the plant into the air around the plant and petitioner's store. During January and February of 1963, large quantities of urea-formalhehyde were deposited into the air surrounding petitioner's store.

The poisonous formaldehyde fumes entered the groceries in petitioner's store causing them to become contaminated. For several frantic weeks, petitioner searched for the source of the poisonous fumes and before he was able to find it, was required to close his business in order to protect the public

health. Subsequently, the health officials of the State formally closed the store.

Respondent, Masonite Corporation, was successful with its elaborate exhaust system in getting the fumes out of its plant, and thereby, it was able to carry on its business. The identical act which enabled Masonite Corporation to carry on its business resulted in petitioner being unable to carry on his business which was in its second decade of operation when Masonite began its operation in the neighborhood.

The petitioner rests upon the facts of this case as found by the District Judge and therefore references to an extensive record are not indicated. It is the law which arises on the established facts which is in issue. We contend that the Court of Appeals for the Fourth Circuit has made a decision which not only seriously conflicts with the Law of North Carolina but also sets a dangerous precedent. If allowed to stand, the decision will allow the petitioner to be deprived of his property and livelihood at the hands of another without any recourse whatsoever.

Basis for Federal Jurisdiction

This action came within the jurisdiction of the Federal Court in the first instance by virtue of diversity of citizenship and by virtue of the fact that the amount in controversy exceeded the sum of $10,000.

Reasons for Granting the Writ

The position of the petitioner is succinctly stated by the experienced and able Judge Bryan in the dissenting opinion in this case:

> "Although he was forced to abandon his business by the defendant's infiltration of his store with noxious odors, as the majority finds, yet the plaintiff is denied

damages. The premise of the holding is that until the creator of a nuisance is notified that his acts are resulting in injury to another, no right of action accrues to the latter, no matter how grievous the intrusion. The consequences of this view are amazing. One's property may be invaded by offensive gases from a source not discoverable for weeks, months or even years, and in the end the property rendered uninhabitable or otherwise valueless, but the injury is not actionable! I cannot believe this is the law in North Carolina."

The majority of the Court of Appeals for the Fourth Circuit has relied for the most part on the Restatement of Torts for its decision that petitioner is not entitled to recover because he did not notify respondent that it was causing the damages. The fact that respondent had known for a number of years that it was blasting formaldehyde into the air around plaintiff's store was accorded no significance by the Court. The Restatement of Torts represents an attempt to condense into a few words and with convenient verbiage an extensive area of the law of any state. The Court relies to some extent on the case of *Morgan* vs. *High Penn Oil Company,* 238 NC 185, 77 S.E. 2d 682, notes that the Restatement of Torts is cited with approval by the North Carolina Court in that case, concludes that the expression of the Restatement is the law of the State and that the facts presented by the petitioner do not meet the test.

It is true that the Supreme Court of North Carolina noted the Restatement of Torts in its decision. However, an analysis of the case shows that the reference to the Restatement amounted to no more than a broad and academic generalization. Indeed, in the same opinion the North Carolina Court used other language which is significantly in conflict with the interpretation placed by the Court of Appeals not only on the Restatement but also on the Law

of North Carolina. For example, the North Carolina Court stated in the course of the opinion as follows:

> "Much confusion exists in respect to the legal basis of liability in the law of private nuisance because of the deplorable tendency of the courts to call everything a nuisance, and let it go at that. . . . The confusion on this score vanishes in large part, however, when proper heed is paid to the sound propositions that private nuisance is a field of tort liability rather than a single type of tortious conduct; that the feature which gives unity to this field of tort liability is the interest invaded, namely, the interest in the use and enjoyment of land; that any substantial nontrespassory invasion of another's interest in the private use and enjoyment of land by any type of liability forming conduct is a private nuisance; *that the invasion which subjects a person to liability for private nuisance may be either intentional or unintentional.* . . . (Emphasis added).

And further, the Supreme Court of North Carolina approved the language of Justice Cordozo:

> "Nuisance as a concept of the law has more meanings than one. The primary meaning does not involve the element of negligence as one of its essential factors. One acts sometimes at one's peril. In such circumstances, the duty to desist is absolute whenever conduct, if persisted in, brings damage to another. Illustrations are abundant. *One who emits noxious fumes or gases day by day in the running of his factory may be liable to his neighbor though he has taken all available precautions. He is not to do such things at all, whether he is negligent or careful.*" (Emphasis added).

In our pursuit of petitioner's rights in this case, extensive research has failed to produce one single case where it has been held by the North Carolina Court that the tort-feasor must intend his specific invasion of another's property in order to be required to respond in damages to the injured party. In many cases, it has been obvious that the defendant intended to do the acts which resulted in the invasion. In these cases, the Supreme Court of North Carolina has failed to even mention a requirement of further intention.

For example, in *Gray* vs. *High Point,* 203 NC 756, S.E. 166, 911 (1932), the city constructed a sewage disposal plant near the plaintiff's property which emitted noxious odors. It seemed obvious that everyone knew the sewage plant was emitting noxious odors. Therefore, whether or not the city had notice that the noxious odors were entering the plaintiff's property nearby was not a point of consideration. The city's intent to cause the odor in the general vicinity was sufficiently adequate to entitle the plaintiff to recover damages. In line with the Law of North Carolina, *the sole question for the jury in that case was whether the odors damaged the plaintiff's property and to what extent.* In this case, the District Court has found that the defendant knew it was emitting noxious odors, that these odors damaged the petitioner and that such damages were substantial. There is no difference between a city's sewage plant emitting odors to the knowledge of the city and the Masonite plant emitting formaldehyde to the knowledge of Masonite.

The *Gray* case is merely representative of a long line of decisions in North Carolina. The case of *Aydlett* vs. *Carolina By-Products Company,* 215 NC 700, S.E. 2d 881 (1939) is another example. Similar facts were involved in that odors from defendant's plant caused damage to plaintiff's property located nearby. This case illustrates the fact that knowledge of the particular invasion is not a matter of

consequence in North Carolina. There the defendant denied at all stages that it had done anything to cause any damage. Again, the sole question for the jury in that case was whether the defendant emitted noxious odors, whether or not those odors damaged the plaintiff and to what extent.

Another case in point is *Glace* vs. *Town of Pilot Mountain*, 265 NC 181, 143 S.E. 2d 78 (1965). Again, this case allowed the property owner to recover for damages to his property resulting from noxious odors. The Court of Appeals has cited this case as authority for its position by reason of the fact that the property owner complained to the defendant of the noxious odors. However, there is no suggestion in the opinion that this notice was a requisite of recovery. It is noted that the sole question presented to the jury was again the question of damages.

The statement of Justice Cardozo quoted above and approved in the *High Penn Oil Company* case is the law of North Carolina. The principle is set further in the case of *Watts* vs. *Pama Manufacturing Company*, 256 NC 611, 124 S.E. 2d 809 (1960). As Judge Bryan has written in his dissenting opinion in this case, recovery in that case was allowed on the Cardozo thesis.

We recognize the fact that this case does not present one of the more monumental problems ordinarily handled by the Supreme Court of the United States. However, it does present a case which the Circuit Court has decided in direct conflict with the laws of the State. Equally as important, it is simple justice that a property owner should be compensated where his property is taken and his livelihood is destroyed at the hand of another for no other purpose than allowing the other party to further its own business.

Conclusion

For the reasons set forth above, we respectfully request the Supreme Court to grant this Petition for a Writ of Certiorari.

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